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IN THE

Supreme Court of the United States

October Term, 1964

No. 864

NELS IRWIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Comes now Nels Irwin and petitions this honorable court for a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case. Decision rendered October 21, 1964. Petition for a rehearing denied December 29, 1964.

OPINIONS

The opinions below are attached hereto in Appendix A.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, United States Code and by Fourth, Fifth and Sixth Amendments to the Constitution of the United States. The writ is presented in conformity with Rule 23, Rules for Sup. Ct. of U.S.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes involved which are set forth in Appendix B hereto are: The Fourth Amendment, the Fifth Amendment, and the Sixth Amendment to the Constitution of the United States; Title 18, Section 1341.

QUESTIONS PRESENTED

1. Whether the errors and omissions in the courts charge to the jury as to the instructions were erroneous and prejudicial.

2. Whether appellants' rights against self-crimination under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States were violated.

3. Whether there was prejudicial error in the ruling of the Court over the objection of appellant to introduction of certain evidence.

4. Whether the Governments proof beyond a reasonable doubt was insufficient to sustain a conviction.

STATEMENT OF THE CASE

Appellant was charged in the Inictment with having prior to May 22, 1958 and continuing to on or about June 1961, with Clarence Nowak and John F. Kerns (Transcript Volume 1, page 2, lines 20-21) devised a scheme to defraud and to obtain money under false and fraudulent pretences by advertising in and by direct mail under the name of Mail Order Distributors (referred to as M.O.D.) work at home mail order business in violation of Title 18, Section 1341 Appellant and his co-defendants were also charged in the Indictment with having made certain false representations in soliciting the purchase of these mail order franchises, which statements were charged to be false (transcript volume 1, page 3, line 7 to page 7, line 20). Each count of the Indictment charges a separate mailing having been made or caused to be made by the defendants in connection with the alleged fraudulent scheme or plan. The case was tried before a jury on all 16 counts. Motion for Judgment of Acquittal was made at the close of the Government's case, and at the close of all the evidence. Motion was denied. Motion for a new trial, and in Arrest of Judgment were each made on October 16, 1963 and each of the said motions were denied. Judgment of Conviction upon the appellants plea of not guilty and the verdict of guilty was rendered October 16, 1963 and the appellant was sentenced to imprisonment of 3 years on counts 1, 2, 3, 4, 5, 6, 7, 9, and 11 of the Indictment to run concurrently

for a total of 3 years. Counts 14, 15, 16, 17, 18, 19, and 21 of the Indictment were suspended and appellant granted probation for a period of four years, the probationary period to begin at the completion of the appellants prison term. A Notice of Appeal was filed on October 25, 1963. A Motion to reduce the sentence was denied by the Court. Appellant has been admitted to bail pending appeal.

REASONS WHY WRIT SHOULD BE GRANTED

The manner in which the Court's charge to the jury was given and the postponement of the Court of any objections to instructions until after the jury had started deliberations put the appellant in a position not to effectively object to the charge of any position thereof and is forced to rely on a showing of plain error with respect to the instructions. The transcript, volume II, pages 592 to 607 show the Court did not fully discuss all of the instructions requested or indicate all of the instructions which the Court intended to give the jury. Rule 30 of the Rules of Criminal Procedure provides that the Court shall inform counsel of the proposed action upon request for charges prior to argument, object is to require the judge to inform trial lawyers' in a fair way what the charge is going to be so they may intelligently argue the case.

Ross v. United States (C.A. Ohio 1950), 180 F. 2d 160, 165.

Because of the nature of the charge as shown by the evidence that two defendants were on trial but not charged with a conspiracy, it was encumbent upon the Court to make clear to the jury the necessity of the union of act and intent, and the burden upon the Government to prove both act and intent beyond a reasonable doubt. Appellant requested instruction 4.01 and 4.02 of 27 F.R.D. 39 to be given, and the instruction falls short of what a proper instruction should be on the question. The Court did not in its charge to the jury make clear that the guilt or innocence of each defendant should be considered seperately. Appellant requested instruction 8.08 and 8.10 of 27 F.R.D. 39 be given for this purpose. Such an instruction it is submitted under the circumstances was rendered more imparative by that portion of the Courts charge in Volume II, page 675, lines 8 to 20, wherein the Court defines a scheme or plan and an artifice and charges the jury that a man who adopts and makes his own scheme to defraud already devised by other, thereby himself devises such scheme or artifice. Nowhere in the Courts charge is to be found in substance the principles enunciated in 8.08 and 8.10 of 27 F.R.D. 39 and such an omission on the part of the trial court constitutes plain and prejudicial error.

United States v. O'Connor (C.A. 2nd 1956) 237 F. 2d, 466, 472.

Reviewing Courts have inherent power upon their own motion to inquire into the adequacy of a charge in cases where there is grave error which amounts to the denial of a fundamental right of the accused.

Fischer v. United States (C.A. 10th, 1954) 212 F. 2d 441, 444.

The Court of Appeals would consider a defendant's argument that the giving of an instruction was error, where there was a possibility that "plain" error might be involved.

Perkins v. United States (C.A. 9th, 1963) 315 F. 2d. 120, 123, 124.

During the course of the investigation by Postal Inspector Jacobson, a witness for the Government, the appellant made a full and complete disclosure of the operations of M.O.D. and that counsel that was present did not represent appellant in any of the proceeding of this trial, was not a criminal lawyer. The question as to whether appellant's constitutional rights have been violated in recent decision in *Massiah v. United States,* ..... U.S. .....12 L. Ed 2d 246 as right to counsel protected by the Sixth Amendment.

In view of these circumstances it must be brought into focus whether or not the appellant's right protected by the Fourth and Fifth Amendment of the Constitution of the United States may not also have

been violated, in this connection Postal Inspector Jacobson, a witness for the Government, had submitted his name on a M.O.D. coupon and he received material in response. Inspector Jacobson gave his own name and post office box but did not reveal his true occupation. In general it appears from Mr. Jacobson's testimony that while interrogating Mr. Irwin, he did answer or attempt to answer Inspector Jacobson and some of the answers appear to constitute admissions on which the prosecution was based (Vol. II, pp. 475-479).

The questions to which objection was interposed were asked of the Government witness, Billy De Sisto, who had been employed by appellant and had done some work in connection with Mail Order Distributors (Volume II. page 10 to page 12). This witness was not hostile to the Government's case and the suggestion by the Government's counsel of complaints having been made and refunds requested by dissatisfied franchise holders was objected to this form of interrogation, as counsel testified instead of the witness. Suggestive questioning of a Government witness as to such matters in a prosecution for mail frauds was highly prejudicial to appellant and that any such statements made in the presence of a jury and allowed to stand are highly prejudicial.

The Government failed to show that the business conducted under the name of Mail Order Distributor's (M.O.D.) was not a legitimate business carried on in good faith, and the evidence in fact affirmitively

shows, to the contrary, that the business was legitimate, proper and not a sham or fraud. The Government relied on the introduction of vast quality of documentary evidence with little more than mere identification of the same. Such statements and representations as appear in the documents amount to no more than sales talk and are inherently of such a nature that they cannot be said to be ipso facto, fraudulent or false. As to the charge of being false and made with intent to defraud, it is noted that these representations insofar as any of them are at all material. It is also plain that success from such venture, at least at the outset depended entirely on the results to be obtained from the use of the mailing list purchased by M.O.D. from William Strole and Company, being one of the oldest suppliers of mail order list, will established in the business, a source which M.O.D. was entitled to rely on. There is no showing that M.O.D. purchased such lists with knowledge of any lack of value therein. The bad faith cannot be inferred from the character of the representation made. Belief in truth of statements made is a good defense, however, inaccurate the statements may turn out to be.

Harrison v. United States (Ohio 1912), 200 Fed. 622, 669, 670;

Rudd v. United States, 173 Fed. 912, 913.

Inpracticability of a scheme is not alone sufficient to convict a defendant of having devised a fradulent scheme.

Turner v. United States 32 F. 2d 126, 127.

However impractical a scheme may have been, use of mails is not a crime if devised in good faith.

Kaufman v. United States, 282 Fed. 776, 779. Cert. Den. 260 U.S. 735, 67 L. Ed, 488.

CONCLUSION

We believe the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, this cause can be resolved only by a decision of this Court on the vital questions herein presented. For the reasons set fourth above we pray that this petition for a writ of certiorai be granted.

Respectfully submitted,

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